STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	DOCKET NOS. INU-00-2 SPU-00-11

ORDER DENYING PETITION TO INTERVENE AND MOTION TO REOPEN PROCEEDINGS

(Issued June 11, 2002)

On February 10, 2000, the Utilities Board (Board) issued an order initiating an investigation relating to the possible future entry of U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), into the interLATA market. The investigation was identified as Docket No. INU-00-2.

In a filing dated May 4, 2000, Qwest encouraged the Board to consider a multi-state process for purposes of its review of Track A (competition issues),[1] various aspects of each item on the 14-point competitive checklist, section 272 (separate subsidiary) issues and public interest considerations. The Board considered the concept of a multi-state process for purposes of its review of a Qwest section 271 application, sought comment, and subsequently issued an order dated August 10, 2000, indicating that its initial review of Qwest's compliance with the requirements of 47 U.S.C. section 271 would be through participation in the multi-state workshop process with the Idaho Public Utilities Commission, North Dakota

[1] See 47 U.S.C. § 271(c)(1)(A).

Public Service Commission, Montana Public Service Commission, Wyoming Public Service Commission, and the Utah Public Service Commission. Since the time of that order, the New Mexico Public Regulation Commission has also joined in the workshop process.

On June 4, 2002, Touch America, Inc. (Touch America) filed a "Petition to Intervene and Motion to Reopen Proceedings" (Motion). The Motion asks the Board to reopen its section 271 proceeding to receive additional evidence regarding Qwest's compliance with sections 271 and 272, the competitive checklist, and the public interest. The Motion also asks the Board to stay the section 271 proceedings pending resolution of Touch America's complaints before the Federal Communications Commission (FCC). In the alternative, Touch America asks the Board to condition its recommendation regarding Qwest's section 271 application on the FCC's resolution of Touch America complaints.

The Motion states that Touch America and Qwest are currently engaged in arbitration, litigation, and complaint actions before the FCC and in federal district court in Colorado. Touch America indicated in its filing it does not wish to litigate its complaint issues before this Board; rather, it wishes to introduce important facts that should be considered relative to Qwest's section 271 application. These facts affect all Qwest competitors, not just Touch America.

Touch America asserted it was imperative that the Board be aware of these matters prior to the submission of Qwest's section 271 application to the FCC. The FCC has indicated "[C]LECs should raise issues [concerning checklist items] in the

relevant state proceedings where they can be properly addressed."[2] The FCC has been very straightforward in its expectation that such issues should not be raised for the first time during the FCC's review of a section 271 application.

Touch America's specific concern pertains to Qwest's lit fiber indefensible rights of use (IRU) service offerings. Two complaints are currently before the FCC, where Touch America contends that Qwest offers lit fiber IRUs as InterLATA "services" in violation of section 271.[3] Qwest has countered that IRUs are "facilities." Touch America contends that this raises a question regarding whether IRUs are subject to the competitive checklist under section 271. Touch America suggests that in light of Qwest's recent arguments that IRUs are akin to unbundled network elements (UNEs), the time is right to examine lit fiber IRUs for checklist compliance, nondiscriminatory access, and pricing under sections 251 and 252 of the Act.

Additionally, Touch America is concerned that Qwest's lit fiber IRUs violate the non-discrimination safeguards of section 272(c). Qwest Communications Corporation (QCC), the currently designated section 272 affiliate, and the affiliate that provides the lit fiber IRUs, has not represented that the IRUs are available to other carriers at the same rates, terms, and conditions. This arrangement, according to Touch America, demonstrates that Qwest and QCC have the ability to prevent

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[2] *Verizon Massachusetts 271 Order* released April 16, 2001, ¶ 192.

[3] *See In the Matter of Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-003 (filed Feb. 8, 2002) ("*IRU Complaint*"); *see also In the Matter of Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-004 ("*Divestiture Complaint*") (filed Feb. 11, 2002).

competitors from purchasing facilities, such as UNEs, by placing assets and facilities with the non-BOC affiliate.

Thus, Touch America urged the Board and the FCC not to turn a blind eye to the unlawful lit fiber IRU offerings of Qwest, adding that the lit fiber IRU discrimination it has alleged will not disappear with the grant of section 271 authority. According to its filing, if Qwest were granted in-region, InterLATA authority today, Touch America would immediately move for a "stand-still" order based on violations of the nondiscrimination provisions of section 272(c) of the Act, noting the FCC has stated, section 271 authority is subject to review and potential suspension or revocation.[4]

On June 6, 2002, Qwest filed its "Opposition to Touch America's Petition to Intervene and Motion to Reopen Issues" (Opposition). Qwest argues that pursuant to 199 IAC 7.2(8), petitions to intervene must be filed with the Board 20 days following the order setting a procedural schedule, "except for good cause shown." Qwest contends that since the procedural order was issued on August 10, 2000, the Motion is inexcusably late, pointing out that Touch America failed to provide any justification for the lateness of its filing so long after the required date, or so long after it became concerned with the issues raised in the Motion.

Qwest characterizes Touch America's suggestion that the seriousness of this issue has just come to its attention as disingenuous. Touch America has threatened to file a complaint with the FCC since mid-2001. It eventually filed complaints with

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[4] *Bell Atlantic New York 271 Order* released December 22, 1999, ¶¶ 446-453.

the FCC in February of 2002. Comments and testimony on this issue were filed in some states as early as November 2001. Qwest noted the Washington Commission has denied Touch America's nearly identical motion (which has been filed in at least ten states) as untimely and urged this Board do the same.

Qwest additionally noted that the Motion adds nothing to the pending FCC complaints and provides no basis to reopen the public interest inquiry. The FCC complaints do not involve local competition issues. Nor has Touch America demonstrated that it has any competitive local exchange company (CLEC) operations in Iowa. The FCC complaints allege that Qwest's in-region dark fiber and lit fiber IRU transactions (1) amount to the provision of in-region InterLATA services in violation of section 271, and (2) violate the terms of the FCC's U S WEST/Qwest merger orders regarding divestiture of such services. The FCC has made clear that disputes arising from Bell operating company (BOC) merger orders, that are currently being considered in its complaint dockets, are best resolved there, and not in connection with section 271 applications.[5]

Qwest states the FCC complaints address the actions of QCC, the affiliate, not Qwest Corporation, the BOC. Therefore, Qwest contends the complaints do not implicate section 272(c). Section 272, which is designed to prevent the BOC from favoring or subsidizing its section 272 affiliate, applies only to the BOC, not to QCC.[6]

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[5] *Verizon Connecticut 271 Order* released July 20, 2001, ¶ 79 (noting that concerns with "Verizon's compliance with the conditions of the Bell Atlantic/GTE merger . . . [should] be appropriately addressed in the Commission's" merger audit proceedings, not the public interest inquiry).

[6] 47 U.S.C. § 272. See also *SWBT Arkansas and Missouri 271 Order*, released November 16, 2001, ¶ 122.

Touch America's effort to relate the FCC complaints to the section 271 checklist have no merit. As the FCC has explained, the public interest inquiry is not a basis for "extend[ing] the terms of the competitive checklist of section 271(c)(2)(B)."[7]

Qwest further indicated in its Opposition that Touch America appears to have misunderstood Qwest's argument that transactions related to facilities are not telecommunications services. In describing the types of capabilities that constitute facilities and permissible section 271 transactions, Qwest has pointed to the FCC's characterization of a number of different types of facilities, including undersea IRUs and satellite transponder capacity. But Qwest has never suggested that an IRU is a UNE. Nor has Touch America made any demonstration that an IRU is a UNE (and therefore subject to either section 251 or the section 271 checklist).

Qwest noted that Touch America initially chose the FCC to file its complaints. Although the FCC complaints are without merit, Qwest has answered them. Since the complaints are already being addressed, Qwest concluded there is no need for the Board to address them also.

Touch America stated it does not wish to litigate its complaint issues before this Board. Instead it wants to introduce important facts that should be considered relative to Qwest's section 271 application.[8] The problem the Board sees with this reasoning is there are no "facts" for the Board to consider. There are only "allegations," which have been taken to the FCC for resolution. To date, there has

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[7] *Verizon Rhode Island 271 Order* released February 22, 2002, ¶ 102.
[8] Motion, p. 2.

been no resolution by the FCC. Thus, for the Board to ascertain the "facts," it would need to litigate the complaint issues – exactly what Touch America indicated it did not wish for the Board to do.

Qwest points to 199 IAC 7.2(8). That rule states that petitions to intervene are to be filed on or before 20 days following the Board's order setting a procedural schedule. That order was issued on August 10, 2000.[9] Still, the rule allows for exceptions to the 20-day provision "for good cause shown."

Considering the importance of this docket, there is no doubt the Board would have exercised leniency of the 20-day provision of 199 IAC 7.2(8) had Touch America filed its petition to intervene earlier. Additionally, had Touch America intervened in any state participating in the multi-state process and brought its concerns forward in those proceedings, the Board would have considered its arguments as it did other CLECs who were not participants to this docket, but had been granted intervention in another state's section 271 proceeding. Touch America's Motion alleges that certain practices and policies of Qwest contravene the public interest of Qwest being granted section 271 authority. Other carriers put forth similar arguments nearly one year ago in the public interest workshop of the multi-state process. Touch America's allegations would have been timely, and perhaps useful, had they been presented during the public interest workshop. Qwest notes that Touch America's IRU concerns had become an issue by mid-2001.

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[9] See *Order Establishing Procedural Schedule and Adopting Multi-state Process*, Docket No. INU-00-2, issued August 10, 2000.

Relying on information from other carriers, the Board noted a Touch America complaint against Qwest, on page 24, of its January 25, 2002, "Conditional Statement Regarding Public Interest and Track A." At that time, the Board ruled that Touch America's complaint, and others like it, did not contravene the public interest. If Touch America had concerns, a petition to intervene might have been granted at that point. Additionally, Touch America could have filed a request for reconsideration of that issue with its intervention.

As it turns out, both AT&T and the Consumer Advocate Division of the Department of Justice voiced concerns with the January 25, 2002, conditional statement. Thus, on March 8, 2002, the Board issued an order "Setting Oral Argument on Public Interest." Touch America could have filed a petition to intervene, at that point, to have its allegations heard and considered by the Board.

Other aspects of Touch America's Motion relate to section 272 compliance. Like the Board's public interest inquiry, the inquiry into section 272 compliance is now complete.[10] A viable petition to intervene should have been filed months ago at the latest.

Bringing a petition to intervene at this late date gives the Board no time to ascertain the facts behind the allegations. The FCC is aware of both Touch

[10] See *Conditional Statement Regarding 47 U.S.C. § 272 Compliance*, issued April 4, 2002, see also *Reconsideration of Conditional Statement Regarding 47 U.S.C. § 272 Comp*liance, issued May 28, 2002.

America's complaints and Qwest's responses. Additionally, the FCC recently rejected the idea that the section 271 process must "resolve all complaints, regardless of whether they relate to local competition, as a precondition to granting a section 271 application."[11] The Board will deny the request to intervene filed by Touch America and its request that the Board reopen the record in this proceeding.

IT IS THEREFORE ORDERED:

1. The "Petition to Intervene and Motion to Reopen Proceedings," filed by Touch America, Inc., on June 4, 2002, is denied.

2. Any responses to this statement and all future filings and Board orders or statements in this docket must be filed no later than close of business on the third business day following the filing or issuance.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 11th day of June, 2002.

[11] *BellSouth Georgia/Louisiana 271 Order* released May 15, 2002, ¶ 305.